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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 742.

CITY OF CLEVELAND, OHIO,

Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO,

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,

Respondents.

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

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December 15, 1965.

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BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

STATEMENT.

This Brief is filed in opposition to the Petition for Writ of Certiorari to the Supreme Court of Ohio of the City of Cleveland, Ohio, whereby that city petitions this Court to review the decision of the Supreme Court of Ohio in *City of Cleveland, Ohio, v. Public Utilities Commission of Ohio,* 3 Ohio St. 2d 82. It shall be the purpose of this Brief to demonstrate that no federal question was before the Supreme Court of Ohio, and none was decided. As a consequence the Petition is without merit, raises no basis upon which to invoke this Court's jurisdiction, and should be dismissed.

ARGUMENT.

The Petition for Writ of Certiorari (hereinafter called "the Petition") should be dismissed because the City of Cleveland did not raise, and the Supreme Court of Ohio (hereinafter sometimes called the Ohio Court) did not decide, any federal question. Therefore, there is no federal question that would be before this Court if the Petition were granted.

The questions considered may be seen from the opinion of the Supreme Court of Ohio, set out as Appendix "B" (pp. 36, 37, 38, and 39) of the Petition for Writ of Certiorari herein. The Supreme Court of Ohio begins its opinion by observing (at p. 37 of the Petition) that the Appellant (your Petitioner here) assigned 55 errors, but reduced those assigned errors to four questions to be decided by that Court.

In its jurisdictional statement and in the Statement of Questions Presented, the Petition indicates that any federal question presented would be based upon the Fourteenth Amendment to the Constitution of the United States and, at page 10, asserts that this federal question was raised in its Notice of Appeal of April 30, 1963, to the Supreme Court of Ohio. For the convenience of the Court, the Notice of Appeal to the Supreme Court of Ohio containing the Appellant's (your Petitioner here) original 55 assignments of error is appended hereto as Appendix "A." The Court will notice that only assignments of error 8, 27, and 50 allege anything that could even vaguely be considered constitutional questions. At no place is the Federal Constitution (to say nothing of any particular provision thereof) mentioned. Assignment 50 alleges an "unconstitutional" application of the rate-making formula, without specifying which constitution or which provision thereof.

Assignments 8 and 27 refer merely to "due process of law," again without referring to any constitution. Assuming one could narrow the search to the Federal and Ohio Constitutions (a somewhat dubious assumption since there is no reference to constitutionality), a problem would be presented in that the Ohio Constitution, as well as the Federal Constitution, provides for "due process of law." *City of Akron v. Chapman,* 160 Ohio St. 382, 385. It was only as an apparent afterthought that the then appellant urged the Fourteenth Amendment of the Federal Constitution as protection against alleged confiscation of ratepayer's property. It is understandable that, with the Federal Constitution sought to be raised only at that late date, the Supreme Court of Ohio ignored that contention in setting out the four questions to be decided (see particularly question one) to which the Appellant had reduced its 55 assignments of error (see the Petition, page 37).

The Ohio Court's disposition of the first question may be seen on pages 37 and 38 of the Petition. Clearly, the Ohio Court—in the highly unlikely event that it felt that there was a constitutional question in fact raised by question one—did not reach any constitutional question. Instead, that Court found that the Commission's decision was not only supported by the evidence, but that (at page 38 of the Petition) "[t]here is evidence in the record to support a much higher rate of return than that asked by the company."

The second question obviously requests the Ohio Court to determine whether *under Ohio law* the Commission could utilize published trend factors to aid in the valuation of public utility plant and property. The City of Cleveland apparently recognizing this, has not included it among its Questions Presented in the instant Petition.

Question three (question two in the Questions Presented in the instant Petition) does, in fact, allege that the Commission's approval of a coal escalation clause was an "unconstitutional delegation" of its power. Again, the Appellant did not specify which constitution, or which provision of that unspecified constitution, the Appellant felt had been violated. If one were willing to speculate on the subject, it would seem more reasonable to conjecture that the Ohio Constitution was the one sought to be invoked, since the Commission's powers and responsibilities derive from the Ohio General Assembly and the Ohio General Assembly's powers are enumerated in the Constitution of Ohio. The Ohio Court found that there was no evidence in the record to demonstrate that the approval of such a clause was unreasonable or unlawful (page 39 of the Petition). It is manifest from the discussion of question three at page 39 of the Petition that the Ohio Court did not feel that a federal constitutional question was before it and did not purport to decide one.

Question four (question three of the Questions Presented in the Petition) does not raise a federal question and does not even purport to. The allegation that the Commission's Order with regard to the effective date of the rate increase is "unlawful and unreasonable" implies more that it is unlawful with reference to the statutes providing for the setting of rates by the Commission and an abuse of the discretion provided by those statutes, than to any constitution. The Ohio Court's answer to question four before it is that it is not a proper one to be raised in an appeal of a rate case. In holding that the question of the date upon which the rate is first charged is a matter between the customer and the company, the Court obviously (even apart from a consideration of whether the

City of Cleveland, except insofar as it may itself be a customer, is not the proper party to raise the question) had in mind that any customer who could not resolve his dispute as to the effective date with the company had available the complaint procedure, provided by Section 4905.26, Ohio Revised Code, with the Commission. In short, the Ohio Court quite properly felt it was being called upon to review the Commission's Order in the light of Ohio statutes, not the Federal Constitution, and did not purport to decide any federal question, since question four raised none.

From the foregoing it is clear that there was no federal question before the Ohio Court and that it decided none.

The Ohio Court was quite proper in considering that there was no federal question before it. The two vague references to "due process of law" are not sufficient to raise one. Thus, this Court held in *Thomas v. State of Iowa*, 209 U. S. 258, at page 263:

> "* * * A mere claim in the court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinctness to give us jurisdiction to consider whether there has been a violation of the 14th Amendment of the Constitution. See Clarke v. McDade, 165 U. S. 168, 172, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; Miller v. Cornwall R. Co., 168 U. S. 131, 134, 42 L. ed. 409, 410, 18 Sup. Ct. Rep. 34; Harding v. Illinois, 196 U. S. 78, 88, 49 L. ed. 394, 397, 25 Sup. Ct. Rep. 176."

Indeed, none of the three vague references to the "due process" and "constitutionality" in the Notice of Appeal refers to the Federal Constitution or any other federal question. It is too late to raise the federal question for the first time in a petition for writ of certiorari, since the record before the state court must show that the federal

question was affirmatively raised there. *White River Lumber Co. v. Arkansas,* 279 U. S. 692, 700, 73 L. ed. 903; *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.,* 252 U. S. 341, 64 L. ed. 601. It must affirmatively appear from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the case, *Southwestern Bell Telephone Co. v. Oklahoma,* 303 U. S. 206, 212-213. Thus, had the Ohio Court's decision been based upon two grounds, one involving a federal question and one not, this Court has held that, where the ground independent of the federal question is sufficient to sustain the judgment, this Court will not take jurisdiction on certiorari, *Lynch v. New York,* 293 U. S. 52, 79 L. ed. 195; *Browne v. Union Pacific Railroad,* 267 U. S. 255, 69 L. ed. 601. In fact, this Court recently held that a federal ground had to be the *sole* basis for decision of the state court. *Department of Mental Hygiene of California v. Kirchner,* 380 U. S. 194, 13 L. ed. 753, 757-758, 85 Sup. Ct. 871, 874.

Here, of course, the Ohio Court has decided the case *solely* on the basis of *state law* and this Court has held that it is without jurisdiction on certiorari to review holdings of state courts which concern matters of state law. *Neblett v. Carpenter,* 305 U. S. 297, 83 L. ed. 182, 59 S. Ct. 170, reh. den. 305 U. S. 675, 83 L. ed. 437, 59 S. Ct. 335.

For all of the foregoing reasons, it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction on certiorari and should be dismissed.

Respectfully submitted,

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December 15, 1965.

APPENDIX A.

NOTICE OF APPEAL, CASE NO. 30,109 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO, APPEAL NO. 38,692 IN THE SUPREME COURT OF OHIO.

IN THE SUPREME COURT OF OHIO.

IN THE MATTER OF THE APPLICATION OF THE CLEVELAND ELECTRIC ILLUMINATING COMPANY FOR AUTHORITY TO AMEND AND TO INCREASE ITS FILED SCHEDULE FIXING RATES AND CHARGES FOR STEAM AND HOT WATER SERVICE IN THE CITY OF CLEVELAND, OHIO.

NOTICE OF APPEAL.

Notice is hereby given by the City of Cleveland, Ohio, (Cleveland) of its intention to appeal from the order of the Public Utilities Commission of Ohio rendered on March 5, 1963, denying to Cleveland a reopening, rehearing, and reconsideration of the order of said Commission of January 8, 1963, in the above captioned matter.

Cleveland prosecutes this appeal as both a ratepayer and a representative of the applicant's ratepayers.

Cleveland submits that the action of the Public Utilities Commission of Ohio (Commission) in denying Cleveland's application of February 6, 1963, for a reopening, rehearing, and reconsideration of its order of January 8, 1963, is unreasonable, unlawful, erroneous and unconstitutional for the following stated reasons:

1. That the applicant did not disclose its intent to file for an increase in steam rates during its last rate negotiations with the City of Cleveland.

2. That the applicant had a duty to make such disclosure.

3. That the applicant in filing for increased steam rates violated its duty of full disclosure to the City of Cleveland.

4. That said violation of duty necessitates the dismissal of this application as a matter of comity and equity.

5. That the applicant's steam operations should not be considered as a separate entity from its electric operations.

6. That the requirements laid down in Section 4909.18 of the Revised Code of a detailed inventory do not require the commission to allow this division of services which is contrary to both economics and reason.

7. That the only legal rates for steam services between January 1, 1954, and January 8, 1963, were those that were established by order of the Commission issued under date of October 9, 1953 in Proceeding No. 24175.

8. That to permit the applicant to charge its customers for services that were rendered entirely before January 8, 1963, on the basis of the rates set on January 8, 1963, is to confiscate their property in violation of due process of law.

9. That in view of the small number of steam customers it would have been a very minor undertaking for the applicant to have read all of the meters of said customers on such date as the new rates became effective in order to render legal charges.

10. That there was no reason for the Commission to confer such unusual billing privileges upon the applicant.

11. That the applicant's coal escalation formulae during a history of over forty years have never resulted in revenue adjustments that were in reasonable balance with changes in the cost of coal (Tr. 743 and 744).

12. That from 1950 through 1962 the applicant's coal escalation formula has caused revenue changes that were consistently 40% greater than changes in the cost of coal (Tr. 687-8).

13. That the Commission denied a motion to investigate into the overcharges for increased coal costs by the applicant to its customers arising by virtue of the provisions of its coal escalation formula.

14. That although the revised coal escalation formula is more accurate than its predecessor, there is insufficient evidence as to whether said revised formula is accurate within acceptable limits.

15. That escalation of coal costs would require that the applicant's books be continuously audited which imposes an undue burden upon the applicant's customers and a responsibility upon the Commission which it has demonstrably been unable to assume.

16. That the practical result of the approval of the escalation of the applicant's coal costs is an abdication of responsibility by the Commission in the face of both a past history of gross abuses and grave possibilities of mischief by the applicant.

17. That the applicant's control over the cost of its coal through its interest in coal producing properties is an invitation to extreme mischief.

18. That the applicant's formula is vague and dependent upon its operating policies which have not been made a matter of record.

19. That the escalation of coal costs deprives the applicant's customers of certainty as to their charges.

20. That the applicant's formula does not provide for increases in combustion efficiencies with corresponding fuel economies.

21. That the applicant views its coal escalation formula as a source of general rate relief rather than as a means for adjusting rates to account for changes in coal costs.

22. That it is highly prejudicial to the applicant's customers to grant the applicant the power to change its rates in view of the applicant's distorted views in regard to the purposes and uses of cost escalation formulae.

23. That neither the Commission nor the applicant have valued the cost of new production of the applicant's property in the detail as required by Ohio law.

24. That the depreciation from the new reproductive cost was consequently not in the detail as required by Ohio law.

25. That neither the Commission and its staff nor the applicant have submitted proof as to the percentage and amount of each class of depreciation as required by Ohio law, and that the depreciation disclosed by the evidence was far higher for each class of depreciable property than that subsequently found by the Commission.

26. That the failure by both the Commission and the applicant to itemize and value the property in question in accordance with Ohio law unreasonably handicapped the City of Cleveland in both the cross

examination of the Staff of the Commission and the applicant's witnesses as well as in the development of the City's case in chief.

27. That Cleveland was denied procedural due process of law by the strict time limitation of only five and one-half days in which to complete the greater part of its cross examination, and the failure to grant Cleveland's motion for an opportunity to audit the applicant's records.

28. That in spite of the severe limitations placed upon Cleveland by the Commission, Cleveland was able to demonstrate conclusively that there were huge inefficiencies in construction for all the major classifications of depreciable property not accounted for by either the applicant or the Staff of the Commission, and that consequently all trended valuation were invalid.

29. That the valuations developed by the Staff of the Commission are dependent upon trends which are applicable to such enormous areas that said trends cannot be expected to be applicable within reasonable limits of accuracy to a much smaller area like Ohio in general and to a still smaller area like Cleveland in particular.

30. That the statutory valuation for boiler plant structures should have been no higher than $2,457,-600.

31. That the statutory valuation for boiler plant equipment should have been no higher than $3,895,-600.

32. That the statutory valuation for mains should have been no higher than $2,784,600.

33. That excess steam losses should be treated as an adjustment to income rather than as an item of depreciation.

34. That excess steam losses were understated.

35. That even if the capitalization of steam losses adopted by the applicant and approved by the Commission were correct in theory, that it was incorrect in application since the inclusion of depreciation as a capitalizable item means that the applicant seeks reimbursement for the same depreciation through an increase in its rate base as well as an expense.

36. That the rate of return assumed for the purpose of capitalizing excess steam losses has been shown to be excessive by both evidence introduced by Cleveland and the decision of the Commission.

37. That the cost of taxes assumed for the purpose of capitalizing excess steam losses is excessive in view of the lower rate of return found to be reasonable and the fact that no consideration was given to the applicant's average effective tax rates.

38. That the applicant's maintenance expenses were excessive.

39. That the cost of depreciation both found by the Commission and advocated by the applicant evinces a much higher rate of depreciation than that which would be a consequence of either the valuation studies of the Staff of the Commission or the applicant's valuation studies.

40. That there is no evidence as to the agreement alleged by the Commission on page 2 of its "Findings and Order" of January 8, 1963.

41. That the allegations made by the Commission in respect to said "agreement" are incorrect as a matter of fact.

42. That the applicant has not sold less than 2,500,000,000 pounds of steam per year at any time since 1955.

43. That the increase in all rate categories of 12¢ per thousand pounds of steam must produce additional revenues of at least $300,000 per year.

44. That less than half the allowance for depreciation set by the Commission is all that is necessary to provide for the capitalizable needs of the applicant's steam plant.

45. That the applicant has not needed to raise capital through the sale of its stock since 1952.

46. That the applicant is currently creating current asset surpluses from all its operations after provision for all needs of over $1,000,000 per year.

47. That the relative capital needs for the applicant's steam operations are smaller than the applicant's capital needs for its other operations.

48. That the relative earnings on capital of the applicant's steam operations have been approximately equal to those of its other operations.

49. That the increased rates will raise the rate of return on capitalization allocable to the applicant's steam operations well above 8% and well above the rate of return earned on the applicant's other operations.

50. That the increase in steam rates granted in this case is so far in excess of the applicant's earnings requirements and so far beyond a generous return

that it is an unconstitutional application of our statutory rate making formula.

51. That the increase in steam rates granted in this case will result in earnings on the applicant's investment which are far in excess of those earned by similar as well as highly profitable and speculative enterprises.

52. That the only evidence introduced as to the earnings of similar enterprises was that by Cleveland which would support a rate of return of less than 3% on the applicant's statutory valuation.

53. That Cleveland has recently begun a campaign to revitalize its downtown area.

54. That the applicant's increased rates will undermine said efforts.

55. That the increase sought by the applicant is a violation of good economic sense.

Respectfully submitted,

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